Lafarge Concrete (M) Sdn Bhd (formerly known as Supermix Concrete (M) Sdn Bhd) v Hasrat Usaha Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D10–22–1484 OF 2005
MARY LIM J
30 SEPTEMBER 2010

Civil Procedure — Trial — Submission of no case to answer — Cross-examination — Whether case ought to be tried as one entire case — Rules of the High Court 1980 O 35 r (4)(5)(c)

Contract — Assignment — Privity — Acts of second defendant were at all times for first defendant — Whether performance of second defendant were in accordance with terms of agreement made between first defendant and plaintiff

Contract — Collateral contract — Construction of — Parties entered into contract with a common third party — No privity contract between plaintiff and second defendant — Mutual understanding and arrangement between defendants relied upon by plaintiff — Whether plaintiff ought to be subjected to detriment or disadvantage resulting from dispute between both defendants.

The first defendant was a main contractor for a project and the second defendant was a subcontractor of the first defendant. The plaintiff, in accordance to terms and conditions by a letter dated 2 April 2002 ('the said agreement'), agreed to supply ready-mixed concrete to the first defendant. The plaintiff supplied concrete to the project site and the delivery orders, invoices and statements of accounts issued by the plaintiff bore the stamps and signatures of the second defendant. However, all payments were made by the first defendant except for the amount claimed by the plaintiff against both the defendants. The first defendant claimed that since all documentation proving deliveries of concrete were in second defendant's name, thus the first defendant had no case to answer and not liable to the plaintiff's claim. The second defendant argued that it was not privy to the said agreement made between the plaintiff and the first defendant. Subsequently, it was agreed the case would be determined by a single issue of who was liable to pay for the concrete sold and delivered to the first defendant. However, the issue was revised further to state which defendants would be liable to pay the plaintiff. During the case, the second defendant chose to adduce evidence but the first defendant did not do so.

Held allowing the claim against the first defendant and dismissing the claim against second defendant:

(1) A case should be tried as one entire case. The rationale being that the trial court should not be hearing evidence in a piece-meal fashion. All evidence ought to be taken first and only then the submissions to follow in accordance with O 35 r (4)(5)(c)of the Rules of the High Court 1980. The first defendant was allowed to cross-examine the witnesses called by the second defendant (see para 8).

(2) The first defendant had honored all invoices for ready-mixed concrete supplied to the first defendant in exactly the same pattern as presented in the instant claim. Hence, the first defendant was now estopped from contending otherwise. The doctrine of estoppel will be invoked to prevent a party who had conducted its dealings in a particular fashion, mode or manner to now go back on the assumption given to the other parties, especially the plaintiff. It would be unjust to permit the first defendant to now insist on a strict literal interpretation which was never been adhered to whether by the terms or from the adduced evidence. The mutual understanding and arrangement between the defendants have induced third parties such as the plaintiff to rely on it should not now be allowed to work to the detriment or disadvantage of the third parties in the event the arrangement breaks down. *Boustead Trading(1985) Sdn Bhd v Arab Malaysian Merchant Bhd* [1995] 3 MLJ 331 referred (see para 25).

(3) The no case submission of the first defendant was without merit. The plaintiff has proved its claim on balance of probabilities. The second defendant's acts were all, as if for the first defendant, and its performance was in accordance with the terms of the said agreement. Hence, the second defendant was at all times acting as the first defendant's authorised personnel. The obligation to pay remains with the first defendant as per the terms of the said agreement (see paras 26–27).

[Bahasa Malaysia summary

Defendan pertama merupakan kontraktor utama untuk sebuah projek dan defendan kedua adalah subkontraktor defendan pertama. Plaintif, berikutan terma-terma dan syarat-syarat melalui surat bertarikh 2 April 2002 ('perjanjian tersebut'), bersetuju untuk membekalkan konkrit siap bancuh kepada defendan pertama. Plaintif membekalkan konkrit ke kawasan projek dan perintah penghantaran, invois-invois dan penyata-penyata akaun dikeluarkan oleh plaintif mempunyai cop dan tandatangan defendan kedua. Walau bagaimanapun, kesemua bayaran dibuat oleh defendan pertama kecuali jumlah yang dituntut oleh plaintif terhadap kedua-dua defendan. Defendan pertama menyatakan bahawa oleh sebab kesemua dokumen yang membuktikan penghantaran konkrit adalah atas nama defendan kedua, dengan itu defendan pertama tidak ada kes untuk dijawab dan tidak

bertanggungjawab terhadap tuntutan plaintif. Defendan kedua menghujahkan bahawa ia bukan pihak kepada perjanjian tersebut yang dibuat di antara plaintif dan defendan pertama. Kemudian, dipersetujui bahawa kes tersebut akan diputuskan atas satu isu sahaja iaitu siapa yang bertanggungjawab membayar untuk konkrit yang dijual dan dihantar serah kepada defendan pertama. Walau bagaimanapun, isu tersebut disemak lanjut untuk menyatakan defendan mana yang akan bertanggungjawab membuat bayaran kepada plaintif. Semasa kes, defendan kedua memilih untuk mengemukakan keterangan tetapi defendan pertama tidak berbuat demikian.

Diputuskan, menolak tuntutan terhadap defendan pertama dan menolak tuntutan terhadap defendan kedua:

(1) Sesuatu kes sewajarnya dibicarakan secara keseluruhannya. Rasionalnya adalah kerana mahkamah bicara tidak patut membicarakan keterangan secara satu persatu. Kesemua keterangan seharusnya diterima dahulu kemudian baru diikuti oleh hujahan berikutan A 35 k (4)(5)(c) Kaedah-Kaedah Mahkamah Tinggi 1980. Defendan pertama dibenarkan untuk memeriksa balas saksi-saksi yang dipanggil oleh defendan kedua (lihat perenggan 8).

(2) Defendan pertama telah membuat bayaran bagi kesemua invois bagi konkrit siap bancuh yang dibekalkan kepada defendan pertama dalam corak yang sama seperti yang dikemukakan dalam tuntutan ini. Maka, defendan pertama kini diestop daripada menyatakan sebaliknya. Doktrin estopel akan dibangkitkan untuk menghalang pihak yang telah bertindak dalam urusannya dalam suatu cara untuk berpaling atas anggapan yang diberikan kepada pihak yang satu lagi, khususnya plaintif. Adalah tidak adil untuk membenarkan defendan pertama untuk kini menegaskan tafsiran literal tegas yang tidak pernah dipatuhi sama ada oleh terma-terma atau daripada keterangan yang dikemukakan. Pemahaman bersama dan pengurusan di antara defendan-defendan yang telah mendorong pihak ketiga seperti plaintif untuk bergantung atasnya tidak boleh sekarang dibenarkan untuk bertindak sehingga menjejaskan atau merugikan pihak ketiga bila pengurusan tersebut tidak berjalan. *Boustead Trading(1985) Sdn Bhd v Arab Malaysian Merchant Bhd* [1995] 3 MLJ 331dirujuk (lihat perenggan 25).

(3) Hujahan tidak ada kes oleh defendan pertama adalah tanpa merit. Plaintif telah membuktikan tuntutannya atas imbangan kebarangkalian. Tindakan defendan kedua adalah kesemuanya, seperti untuk defendan pertama, dan pelaksanaannya adalah berikutan terma-terma perjanjian tersebut. Dengan itu, defendan pertama pada kesemua masa bertindak sebagai pihak yang diberi kuasa defendan pertama. Kewajipan membayar kekal pada defendan pertama seperti terma-terma perjanjian tersebut (lihat perenggan 26–27).]

Notes

For a case on construction of, see 3(3) *Mallal's Digest* (4th Ed 2011 Reissue) para 3531.

For a case on submission of no case to answer, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) para 8866.

For cases on privity, see 3(3) *Mallal's Digest* (4th Ed 2011 Reissue) paras 2894-2897.

Cases referred to

Boustead Trading(1985) Sdn Bhd v Arab-Malysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 776, HC (refd)

Hummerstone v Leary [1921] 2 KB 664, KBD (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 AMR 3744, SC (refd)

James v Australia and New Zealand Banking Group Ltd (1986) 64 ALR 347, FC (refd)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Ng Neoh Ha & Ors v Maniam & Ors [1994] 1 MLJ 434, HC (refd)

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (refd)

Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229; [2006] 4 CLJ 50, CA (refd)

Sykt Kayu & Perdagangan Sdn Bhd v MAA-Sri Keladi Sdn Bhd [1986] CLJ (Rep) 695

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141; [2010] 1 CLJ 381, FC (refd)

YK Fung Securities Sdn Bhd v Ronald Yeoh Kheng Hian [1989] 3 MLJ 490, HC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2010] 1 MLJ 85; [2010] 1 CLJ 484, CA (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92

Rules of the High Court 1980 O 35 r 4(5)(c)

Sale of Goods Act 1957 s 31

Desmond KL Ng (Vernon Samuel with him) (Shui-Tai) for the plaintiff.

Christie Soosay Nathan (Mohamed Fakhzan with him) (Christie Soosay Nathan & Associates) for the first defendant.

SM Wong (Wong Gowry & Yip) for the second defendant.

Mary Lim J:

BACKGROUND FACTS

[1] The first defendant was the main contractor in a project known as the 'Proposed construction and completion of Light Rail Transit (LRT) Infrastructure Works and Boulevard Packages at Precinct 3 & 4 for the Putrajaya Core Island Development Packages LRT-BLVD 103 & 104' ('the project'). The second defendant was its subcontractor. By letter dated 2 April 2002, the plaintiff agreed to supply ready-mixed concrete to the first defendant on the terms and conditions as set out in the letter ('the said agreement'). The plaintiff duly supplied the concrete to the project site. All the delivery orders, invoices and statements of accounts issued by the plaintiff bore the stamp and signatures of the second defendant. All payments were made by the first defendant save for the amounts which are now the subject of the instant claim. The plaintiff claimed from both defendants the outstanding amounts but both of them refused to pay, with each defendant contending that the other was liable.

[2] At the outset of the trial, it was agreed that the case be determined by the single issue of who then was liable to pay for the concrete sold and delivered, is it the first defendant or the second defendant, or both. This question was relooked just before trial commenced and the parties agreed that the issue rightly should be which of the two defendants is liable to pay the plaintiff.

[3] The plaintiff called two witnesses and then closed its case, at which point the first defendant submitted that there was no case for it to answer and elected not to call evidence. The second defendant on the other hand, chose to adduce evidence. Consequently, the question was having made that election, did the first defendant still have a right to cross-examine the second defendant's witnesses. Whether by making such a submission, the first defendant not only lost the right to call evidence but the right to participate further in the proceedings. After hearing counsel, I ruled that the first defendant's right to cross-examine the second defendant's witnesses was preserved, subject to there being no indirect effect of adducing evidence. I gave my reasons for my ruling but in view of the significance of this related issue, I felt it best to set out my reasons in full.

SUBMISSION OF NO CASE BY ONE OF TWO DEFENDANTS

[4] Order 35 r 4(5)(c) of the Rules of the High Court 1980 provides for the order of speeches where there are several defendants and where one of them opts to adduce evidence while the other proceeds to adduce evidence. It does

not however, deal with the matter of the right to cross-examine witnesses in such circumstances. For this, one must bear in mind the significance of the election when a defendant submits there is no case to answer, be it because the plaintiff has not established its case or that the burden of proof has not been discharged. This becomes trickier when there are several defendants involved, each taking a strategic judgmental call in order to advance their diametrically opposing interests, each seeking to exculpate and establish blame on any other save on itself. The election must be made; otherwise an unsuccessful defendant whose submission of no case to answer has been rejected by the court may then call evidence. Generally, a court should try cases in its entirety, taking all evidence and hearing all the parties before making a determination. In a situation where there are multiple defendants, that would include the evidence to be offered by the defendants who have opted to adduce evidence. Otherwise, there is the danger of the court and more importantly, the innocent plaintiff left with no recovery.

[5] This happened in *Hummerstone v Leary* [1921] 2 KB 664, a case concerning a claim for damages against the owners of two motor vehicles, where the plaintiff was a passenger in one of them. At the close of the plaintiff's case, the counsel for the lorry submitted that there was no evidence against his client. The evidence of the other defendant was not taken. This submission was accepted by the court which proceeded to dismiss the claim against the defendant lorry owner. The court then went on to hear the evidence of the remaining defendant, the owner of the car. The witnesses of this defendant threw all blame on the lorry driver. The court then found the driver of the car not negligent and dismissed the case against this defendant as well. This left a very unhappy and dissatisfied plaintiff who then appealed. Bray J (at *p 666*) observed the course of action taken by the trial judge and said:

> … In our opinion the learned judge took an entirely wrong course in allowing Leary to be dismissed from the action. Instead of trying the case as one entire case, which it was, and hearing all the evidence before arriving at a conclusion, he divided it into what we may call compartments and tried each separately, the result of which was that it was never really tried at all. He treated it as a claim against Leary alone and a claim against Foster alone, overlooking the fact that the plaintiffs, as they were entitled to do under the Rules, were alleging that either Leary or Foster or both were responsible for the accident. When once a state of facts were proved, as it was, from which the reasonable inference to be drawn was that prima facie one if not both drivers had been negligent, the plaintiffs were entitled to call on the defendants for an answer, and the proper time at which to decide whether on the evidence one defendant or the other defendant or both the defendants were liable was at the close of the whole case.

[6] In *James v Australia and New Zealand Banking Group Ltd* (1986) 64 ALR 347, a similar issue arose but approached from a slightly different perspective.

The counsel making the submission asked the court to hear and deal with the no case submission before evidence was presented by the other defendant. Counsel for the defendant who was making a no case submission argued that it was entitled to cross-examine the other defendant's witnesses and make a final submission in the event the no case submission was overruled. The stances of the counsel in that case shifted overnight and after examining the development of the submission in several jurisdictions, Toohey J of the Federal Court of Australia said at p 401:

> In the present case the first respondent has not made a no case submission and so the applicants have not been concerned to show a prima facie case against that respondent. But I can see no difference in principle to the procedure to be followed where on respondent impliedly acknowledges a prima facie case against him.
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> …
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> … In those circumstances I am of the opinion that, in so far as the no case submission has an evidentiary basis, I should not entertain it. The second respondent proposes to call evidence, the second and third respondents have elected not to do so and it will be for the court to determine at the end of the first respondent's case, and in the light of the final addresses, whether the applicants have made good any cause of action against any of the respondents. It is implicit in this view that the second and third respondents must be permitted to make a final address. They can hardly be precluded from doing so since all they have sought to do is to argue that they have no case to answer. Equally I am of the opinion that the second and third respondents are entitled to cross-examine any witnesses called by the first respondent. As a general proposition, that cross-examination would not constitute the calling of evidence though it is conceivable that an issue may arise as to whether an answer to a particular question or the production of a document to a witness may constitute adducing evidence. These are matters on which I express no view until they arise, if they do, for decision.

[7] Locally, there are decisions aplenty on the importance of the election when a no case submission is made. See *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 AMR 3744; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor bin* [2008] 3 MLJ 81; [2008] 2 CLJ 369; *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229; [2006] 4 CLJ 50; *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85; [2010] 1 CLJ 484; and more recently, *Takako Sakao (F) v Ng Pek Yuen (F) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 381,. No case submissions are hard choices which must be made wisely after careful and thorough examination of the plaintiff's case and evidence adduced. But, these submissions are almost always assumed where either there is just one defendant or where all the defendants have taken a common stance. There is however the decision in *Ng Neoh Ha & Ors v Maniam & Ors* [1994] 1 MLJ 434, where KC Vohrah J (as he then was) had to determine a similar no case submission where there were several defendants who made different choices and the issue was

when were the submissions to be taken, before or after all the evidence had been adduced. His Lordship made a distinction between submissions involving questions of law which can be divorced from findings of fact by the court and those which cannot:

> In both the cases of James and J-Corp Pty Ltd, there is no disagreement that where there is a submission of no case involving a question of law which can be divorced from findings of fact by the court, then the court (where such a submission is made) may entertain the submission.
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> There is, however, disagreement where the submission of no case is on an evidentiary basis and also where the submission of no case involves a question of law which cannot be divorced from findings of facts which will have to be made by the court. In James, Toohey J was of the view that the court should not entertain either the submission but should consider the evidence at the end of the hearing of the evidence.
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> …
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> French J in J-Corp Pty Ltd, in disagreeing with the view of Toohey J, observed that in Menzies the full court of the Supreme Court of New South Wales approved the practice prescribed in Hummerstone and said it should be followed in all cases where two or more defendants were joined under the provisions of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) …
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> …
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> French J held that the question whether or not to entertain a no case submission by one of several respondents is, like the simple case of one respondent, a matter of proper case management having regard to the interests of justice, including convenience and economy in time and money. It is in essence one of practice within the general discretion of the court to regulate the conduct of the trial. With respect, I think the view of French J makes good sense and I would adopt his view.

[8] Although the decision concerns the submissions, it nevertheless indicates that it is proper case management that all evidence should be adduced and recorded first even where the several defendants have adopted different strategies. In my view, a case should be tried as one entire case; the rationale being the trial court should not be hearing evidence in a piece-meal fashion. All evidence ought to be taken first and only then are the submissions to follow in accordance with O 35 r 4(5)(c). Accordingly, I ruled that the first defendant was allowed to cross-examine the witnesses called by the second defendant. The trial then continued without incident in that there was no occasion or cause to consider whether the first defendant was adducing evidence after having made the election. The second defendant called one witness who was cross-examined by the first defendant's counsel.

THE PLAINTIFF'S CASE

[9] Mr KL Ng, learned counsel for the plaintiff submitted that the

implementation of the said agreement and of the first defendant's acquiescence to that implementation was as testified by the plaintiff's witnesses and by the second defendant's witness; and the first defendant was estopped from contending otherwise. Such evidence revealed that the plaintiff had complied with the requirements of cl C(ii) of the said agreement as found in the letter of 2 April 2002, that it produced and supplied the first defendant with concrete of the 'quantity and schedule of delivery for the Readymixed Concrete shall be as per our site requirement'. Learned counsel contended that the plaintiff was entitled to adduce extrinsic evidence on the material details of the arrangements because the said agreement was silent on these matters and because the evidence sought to be introduced was not inconsistent with the terms of the written agreement. For this purpose, Mr Wong Chee Leong 'PW1', the vice president for marketing, strategy and development of the plaintiff testified that he had attended the negotiations of the said agreement together with his former boss Mr Ho Yoon Tee. In those negotiations, the first defendant was represented by one Dato' Hj Noordin Omar while the second defendant was represented by Mr Soon Chong Hoong, its general manager-contracts; and one Mr Tong Wai Yong, its chief operating officer. According to PW1, in such a big project like the development of Putrajaya, it was 'pretty common' to have the first defendant as the main contractor and for the first defendant to have 'many, many subcontractors'. The second defendant was in fact the first defendant's subcontractor appointed to manage the project. The negotiations culminated in the parties agreeing that the first defendant would appoint the plaintiff to supply concrete to the project pursuant to orders by the second defendant. The first defendant would then pay for the concrete delivered to the second defendant and would pay against invoices and delivery orders issued to the second defendant. All this was reflected in the terms of the said agreement.

[10] The plaintiff's second witness was its product specifier, Mr Peter Chan Farn Her 'PW2'. He was responsible for following-up on payments for all concrete supplied. Although all the invoices and statements of accounts were issued in the second defendant's name and had the second defendant's address at No 6 Jalan Gelenggang, Damansara Heights, Kuala Lumpur, PW2 personally handed these documents to one Miss Julie Chan or her staff at the site office of the project, that is, at Putrajaya. PW1 also testified that neither of the defendants ever issued purchase orders. Instead, orders for the quantities and schedules of supply of concrete were made through phone calls to him or to the plant manager by Mr Tan Kim Foo, the project manager 'and other names' that PW2 could not recall. Mr Tan and 'those other names' were stationed at the site. He had no records of these orders but he knew that the concrete ordered were all supplied to the project site where both defendants shared the same site office. What he had were the delivery orders, invoices and the statements of accounts.

[11] The unpaid invoices and other related documents form 30 volumes for use at the trial. Amongst the documents filed, specifically bundle A20 were payment vouchers signifying payments by the first defendant for the concrete supplied and delivered to the second defendant and where the invoices, delivery orders and statements for such deliveries did not have the first defendant's name or particulars. According to PW2, he signed on these vouchers whenever payments were made. After the suit was filed, the first defendant made a further payment of RM50,000 thus reducing the amount claimed to RM607,134.37 together with interest of RM245,808.62 as at 9 May 2005 and still continuing at the rate of 1.5% per month on the principal sum of RM607,134.37.

[12] As it turned out, Miss Julie Chan was in fact Chan Sook Lei 'DW1', the second defendant's sole witness. At the material time, she was the senior contracts administrator for the project and she had the responsibility of overseeing the contract section at the site level. Logically, she was based at the site office. She testified that both defendants were in reality working as a single entity with the second defendant wearing two hats and representing the first defendant at site meetings with PJH. This was reflected in her name card which carried both defendants' names despite DW1 being the second defendant's employee. DW1's job entailed preparation and submission to PJH, both defendants' monthly interim claims for work done. She also saw to the preparation of their subcontractors' monthly claims for work done and suppliers' claims for goods such as concrete and steel bars supplied to the site. Basically, she did both defendants' work. In her testimony, she confirmed PW2's evidence; that the invoices and statements were hand delivered by PW2 who had helped her staff matched these invoices with the delivery orders in their possession. According to DW1, these invoices were then handed over to the first defendant's 'site office for payment processing' to the plaintiff. These invoices were later settled by the first defendant without incident. DW1 further confirmed PW2's testimony that there were no purchase orders as the parties had agreed that the said agreement and phone calls to the plaintiff were all that was required for concrete to be supplied by the plaintiff.

[13] In the plaintiff's alternative argument against the second defendant, Mr Ng submitted that the second defendant was the real player in the whole project. The first defendant was but a 'mere vehicle' used by the second defendant in securing and performing the project. Since the concrete was supplied to the second defendant with all the delivery orders, invoices and statements of accounts bearing the second defendant's details, it does not matter who finally paid for the concrete. Learned counsel also contended that DW1's evidence that she had complained to PW2 about the invoices being wrongly issued to its name was of no real relevance as this was only brought up long after the project was underway. In any case, DW1 did not follow through

with the matter. The second defendant was therefore liable to pay for the concrete supplied since it was not denied that the orders were made by, and the deliveries were made to, the second defendant.

THE SECOND DEFENDANT'S CASE

[14] Miss Wong, learned counsel for the second defendant submitted that this was a simple case of sale and delivery of goods from the plaintiff to the first defendant which was 'complicated by the Plaintiff when the Plaintiff opted to place the 2nd Defendant's name and address on their delivery orders, invoices and statements of accounts'. That complication was however said to have been 'eliminated by the evidence proffered' by witnesses of both the plaintiff and the second defendant. Learned counsel contended that based on the terms of the said agreement, it was abundantly clear that the said agreement that the relationship was one between the plaintiff and the first defendant. The said agreement was clear and specific on the terms relating to pricing, terms of payment, concrete production, concrete guarantee and tests, liability for rejected/defective goods and insufficient supply, wastages and general matters. The second defendant was not privy to this agreement. Therefore, the second defendant had no obligations insofar as payments for the concrete sold and delivered by the plaintiff here was concerned. She further submitted that PW1's evidence on the meeting prior to the execution of the said agreement showed that although deliveries were to the second defendant, it was always the intention of the parties that the first defendant would pay for the concrete delivered.

[15] The second defendant also took issue with the following: the absence of purchase orders; that the plaintiff could not prove who affixed the seconnd defendant's signatures on the delivery orders; that there were other company stamps on the delivery orders; the lack of proof of receipts of the invoices and statements of accounts; and the presence of debit notes issued by the first defendant. All this purportedly supported its contention that it was the first defendant who is liable to pay the plaintiff for the concrete supplied; and not the second defendant.

THE FIRST DEFENDANT'S NO CASE SUBMISSION

[16] In summary, Mr Soosay Nathan's argument is that the overwhelming documentary evidence adduced at trial and the applicable law is clear in that it is the second defendant who is the buyer of the goods in question in which case it is the second defendant who is under a legal duty to pay for such goods sold by the plaintiff. The plaintiff therefore has no case to answer.

[17] Mr Soosay Nathan's submission focused on the statement of claim and

the documentary evidence. In his view, the said agreement was obviously one between the plaintiff and the first defendant. Clause B(i) of the said agreement provided that the 'terms of payment shall be 30 days upon receipt of invoice. All delivery orders must be signed by our authorized personnel'. This meant that the first defendant would pay within 30 days upon receipt of invoice with all delivery orders signed by the first defendant's authorised personnel. Although that was the agreement, the pleadings and the evidence showed that even before the agreement was drawn up, concrete was sold and delivered as early as 15 December 2001. And, in the entire 30 volumes of documents filed, there was not a single invoice, statement or delivery order that was issued in the first defendant's name. The invoices had advised the recipients to 'revert to us in the event of any discrepancies within 21 days of date of this invoice failing deemed to be accepted as correct'. Since the second defendant failed or never lodged any complaint, that was said to be the 'most telling in the circumstances of the case'. Under the circumstances, the second defendant and the plaintiff were clearly 'buyer' and 'seller' within the meaning of the Sale of Goods Act 1957; and s 31 of the same Act which provides that 'It is the duty of the seller to deliver and the of the buyer to accept and pay for them in accordance with the terms of the contract of sale' obliges the second defendant to pay for the goods supplied by the plaintiff, and not the first defendant.

[18] Relying on a line of authorities starting with *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124, FC; *YK Fung Securities Sdn Bhd v Ronald Yeoh Kheng Hian* [1989] 3 MLJ 490, HC; *Sykt Kayu & Perdagangan Sdn Bhd v MAA-Sri Keladi Sdn Bhd* [1986] CLJ (Rep) 695; *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 776, HC, the first defendant argued that it was not open to the plaintiff to adduce oral evidence to contradict the overwhelming documentary evidence which demonstrated and supported his submission. He submitted that this would violate ss 91, 92 of the Evidence Act 1950. The claim was therefore misconceived in law and he sought for the claim to be dismissed against his client.

FINDINGS

[19] The dispute here is not over the quantity and quality of concrete supplied; or the amount claimed. From the evidence and the submissions of the parties, it can be properly taken that the amount as explained by PW2 is the correct sum due to the plaintiff. As for the issue of liability, the first defendant has adopted a literal approach in that since all documentation proving deliveries of concrete are in the second defendant's name, the first defendant has no case to answer and is not liable to a claim founded on the written agreement of 2 April 2002. The second defendant on the other hand, premised its case on privity; that it is not privy to the written agreement concluded between the plaintiff and the first defendant. So, while the concrete may have

A been delivered to the second defendant and the documentation is in the second defendant's name, it is the first defendant who is to pay and who in effect has been paying all this time save for the invoices which are now the subject of the present claim.

B **[20]** Looking at the said agreement, I observe that it contains the essential terms for the formation of a contract. I shall reproduce the relevant parts so that the arguments can be better appreciated:

C Contract Name: PROPOSED CONSTRUCTION AND COMPLETION OF LIGHT RAIL TRANSIT (LRT) INFRASTRUCTURE WORKS AND BOULEVARD PACKAGES AT PRECINCT 3 & 4 FOR THE PUTRAJAYA CORE ISLAND DEVELOPMENT - PACKAGES LRT-BLVD 103 & 104

Subject: *SUPPLY AND DELIVERY OF READYMIXED CONCRETE*

D We refer to your quotation ref: SPMM/CP/PL-01 dated 26 September 2001 and our further clarifications. We are pleased to confirm our acceptance of your offer to supply and delivery of Readymixed Concrete as per following terms and conditions.

(A) PRICING

(i) Ready Mixed Concrete (Standard OPC / PFA)

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Grade	Characteristic Strength (N/mm2) (at 28 days)	Normal Mix (85 ±15mm) Slump	Pump Mix (100 ±25mm) Slump	Tremie 1 (125 ±25mm) Slump	Tremie 2 (165 ±25mm) Slump
10	10	111.50	-	-	-
15	15	116.50	-	-	-
20	20	121.50	124.50	129.50	134.50
25	25	127.50	130.50	135.50	140.50
30	30	134.00	137.00	142.00	147.00
35	35	142.50	145.50	150.50	155.50
40	40	151.50	154.50	159.50	164.50
45	45	161.50	164.50	169.50	174.50

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G

(ii) Rebate shall be given to us in accordance with the tabulation below:-

H

Item	Description	Rebate (RM)	Rate
1.	Before setting up of the designated batching plants at Putrajaya site. (The concrete shall be delivered from existing commercial plants in Putrajaya or Puchong).	15.50 cu.metre	per
2.	After setting up of the designated plants at Putrajaya (8 weeks from 20/1/01 i.e. 14 December 2001 onwards)	21.50 cu.metre	per

I

(iii) The above prices shall be held firm for all concrete delivered during the entire duration of the project. You are deemed to have included for fluctuation of prices in respect of material, labour, exchange rates, statutory contribution, duties, freight, transport charges, testing, etc.

(iv) The above price is inclusive of delivery up to the point of discharge. The point of discharge shall be as per our designated location.

(v) The price is inclusive of all concrete supply beyond normal working hours, Sunday and Public Holidays.

(vi) The concrete prices shall be fixed and remain unchanged for a quantity of up to 480,000m3 and for a period of 18 months commencing from 1 November 2001.

(B) TERMS OF PAYMENT

(i) The terms of payment shall be 30 days upon receipt of invoice. All delivery orders must be signed by our authorized personnel.

(ii) All royalty payment to Putrajaya Holdings Sdn Bhd shall be paid by HUSB.

(C) CONCRETE PRODUCTION

(i) By virtue that the designated plant productions are dedicated solely to supply to the LRT 103/104 Packages, you have agreed that the minimum provisions as stipulated in Attachment I are binding on your part to ensure our concrete demands are met.

(ii) The quantity and schedule of delivery for the Readymixed Concrete shall be as per our site requirement.

(iii) HUSB shall obtain the whole volume of concrete required for the project from SPMM from the dedicated plant over the 18-months duration and in the event the volume is less than 250,000.00m3, HUSB will compensate SPMM RM5.00 per m3 for the difference between the actual concrete purchased and the volume of 250,000m3 subject to Clause E (ii) which event any concrete obtained from any other sources pursuant to Clause E (ii) shall form part of the minimum volume of 250, OOOm3.

[21] From these terms as well as from the evidence given at trial, it appears that although not in the usual formal form, the said agreement covered all the necessary areas and more. The terms extended to matters which were peculiar to this arrangement, such as the where the concrete required was to be produced and the provision of rebates - see cl A where pricing of the concrete included rebates to be given. The amount of rebate varied depending on where the concrete was produced. Initially, the concrete was produced at the plaintiff's existing plants in Putrajaya or Puchong but the plaintiff was expected to set up designated plants at Putrajaya itself. Presumably, this must have been to facilitate the speedy and efficient supply of huge amounts of concrete that was anticipated for the development of the project. The rationale behind the

provision of rebate was explained by PW1. According to him, the plaintiff was appointed by PJH as one of two designated concrete suppliers for the project. In return for this exclusivity, the plaintiff was required to 'pay royalty' to PJH (see cl B(ii)). These payments were worked into the prices quoted to the first defendant who had undertaken to pay directly to PJH the amounts due as royalty. In addition, by cl E of the said agreement, the first defendant assured the plaintiff the minimum volume of concrete that would be ordered; failing which the first defendant agreed to compensate the plaintiff based on RM5 per millimeter cube. This obviated the need for issuance of purchase orders every time concrete was required. All that the defendants needed to do was to telephone the plaintiff. I see nothing wrong or surprising to this in view of the identity of the project and its circumstances. PW2 and DW1's evidence confirms that the implementation of this clause in the terms as agreed between the parties. I therefore do not regard the absence of purchase orders as detrimental. Although PW2 and DW1 are under the employment of the respective parties (in the case of DW1, at the material time as she has now joined another company), both witnesses came across as sincere, neutral and solely fact-based who had no interests other than to answer the questions as posed by the respective counsel.

[22] Having heard these witnesses as well as PW1 and having examined the documentary evidence, there is no doubt in my mind that the parties here were always quite aware of their respective positions in the whole scheme of arrangement. They were essentially in a well-understood relationship where there was clear mutual understanding of their rights and obligations. This understanding allowed them to confidently conduct themselves in accordance with the said agreement for a good long part of the project without any incident or protest from any of the parties, especially the first defendant. That understanding was that concrete was to be delivered to the second defendant pursuant to its orders with payments for the same by the first defendant. There is a simple reason for this and it is this — the said agreement was implemented in precise accord with its terms. And, that accounts for why there were no complaints or protests, be it oral or written or even both, from any of the defendants. The error in using the details of the second defendant in the relevant documentation only evoked a 'token' protest as it was never seriously pursued. In fact, I would venture to say that DW1 raised this with PW2 not so much in protest disputing accountability but rather for housekeeping purposes. This 'error' in the related documentation at no time presented obstacles to the parties. The defendants are not strangers to one another. They use common employees or personnel; share a site office; and have common control at the boardroom level.

[23] In my judgment, the evidence on how the concrete was ordered, delivered, invoiced and paid do not offend the rule against extrinsic evidence

under ss 91 and 92 of the Evidence Act 1950. The plaintiff was not attempting to contradict what was contained in the said agreement but merely to show how it was complied with. The terms in the said agreement are couched in language which allows the witnesses called to explain how these terms were understood and implemented. Sections 91 and 92 of the Evidence Act 1950 do not deprive any party from adducing evidence to explain how a written contract was implemented and that is what was observed in the facts of this case. For example, in cl B(i), it is provided that 'the terms of payment shall be 30 days upon receipt of invoice. All delivery orders must be signed by our authorized personnel' while cl C(ii) provided that 'The quantity and schedule of delivery for the Readymixed Concrete shall be as per our site requirement'. PW2's testimony, as confirmed by DW1, showed how site requirements for the concrete were placed through phone calls made either to him or to the plant manager; by Mr Tan Kim Foo, the project manager 'and other names' that PW2 could not recall. The concrete ordered was also delivered to the first defendant's site and acknowledged by the second defendant. It does not matter that this site was also the second defendant's or that the site office was shared by the second defendant, or that there was a strong presence of the second defendant's management so long as the site to which the concrete was delivered was the first defendant's and it had personnel there. In fact, it would be more than adequate if the first defendant had just the one junior clerk at the site (the first defendant in fact had a clerk at the site office) or that it authorised others to perform the various functions outlined in the said agreement.

[24] On a totality of the circumstances and the evidence before me, including PW2's explanation that he regarded the second defendant as 'indirectly they are the employees of Hasrat for this project' and having regard to the relationship of the defendants and the conditions on site, particularly as explained by DW1, I have no hesitation in holding that whole transaction of ordering, delivering, acknowledging and paying for the concrete was fully in accordance with the terms of the said agreement. The identity of the persons who performed each of those roles and who their employers were; as well as the details in the related documentation were immaterial or inhibiting in any way as to prevent or even delay payment by the first defendant. DW1's role in the whole transaction is illustrative of this. She carried business cards bearing both defendants' details; processed both defendants' claims; attended to various matters interchangeably for both defendants, especially in the processing of the plaintiff's claims and all without any complaint or difficulty from the first defendant. The defendants just wanted to get on with the performance and completion of the whole project in relation to PJH so that ultimate payments can be made.

[25] The evidence also revealed that the first defendant diligently and quite happily, without complaint or reservation, honoured some RM54m worth of

concrete supplied in exactly the same fact pattern as those presented in the instant claim. In view of this evidence, the first defendant is now estopped from contending otherwise. The doctrine of estoppel will be invoked to prevent a party who has conducted its dealings in a particular fashion, mode or manner to now go back on the assumption given to the other parties, especially the plaintiff. It would be unjust to permit the first defendant to now insist on a strict literal interpretation which in the first place has not been borne out, whether by the terms or the evidence adduced — *Boustead Trading(1985) Sdn Bhd v Arab-Malysian Merchant Bank Bhd* [1995] 3 MLJ 331. I further observe that the mutual understanding and arrangement between the defendants which have induced third parties such as the plaintiff to rely on it should not now be allowed to work to the detriment or disadvantage of the third parties in the event that arrangement breaks down for one reason or another. In any case, the first defendant has opted not to adduce evidence to explain who its 'authorised personnel' are or what the term means. In the absence of any explanation or evidence to the contrary, the evidence of the plaintiff stands uncontroverted. The second defendant's personnel and the acts of its personnel in the circumstances of this case are well-within the meaning and intent of the phrase 'authorised personnel'.

[26] Accordingly, I have no hesitation in finding that the plaintiff has established its case for the first defendant to answer. In choosing not to lead evidence as to why the past circumstances or conduct were of no relevance to the invoices, delivery orders and statements of accounts now at issue, I can only conclude that the circumstances as shown by the plaintiff are indeed also true and correct. The no case submission of the first defendant is therefore without merit and must be dismissed. On the evidence adduced, I am further satisfied that the plaintiff has proved its claim on a balance of probabilities and I hereby order the first defendant to pay the plaintiff the sum as claimed together with interest at the rate of 8%pa from the date of judgment to the date of realisation together with costs of RM15,000.

[27] As for the claim against the second defendant, the ancillary issues pertaining to absence of purchase orders, identity of persons who affixed the second defendant's signature and the like are disregarded in light of DW1's own evidence. From her testimony, these matters which are now raised by learned counsel did not in the least perturb her. Of relevance however, is her evidence that the second defendant's acts were all, as if, for the first defendant. I am therefore satisfied that the performance in the manner explained by the plaintiff's witnesses and by DW1 is in full accord with the terms of the said agreement. The second defendant was at all material times acting as the first defendant's authorised personnel. The obligation to pay remains with the first defendant as per the terms of the said agreement for the reasons already explained. Accordingly, the claim against the second defendant is dismissed

with costs of RM15,000. I must add that this sum of RM15,000. was proposed by all counsel as being reasonable costs.

Claim against first defendant allowed and claim against second defendant dismissed.

Reported by Mashrifah Ravendran